Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-988

DAVID RICHARDSON, PATRICIA KING, PATRICK KELLY and HIRAM SPAIN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

J. MEANS McFADDEN, MORRIS D. ROSEN, C.W.F. SPENCER, ROBERT D. SCHUMPERT, DAVID L. FREEMAN and ALBERT L. JAMES, JR., individually and as members of the State Board of Law Examiners; and MISS FRANCIS SMITH, Clerk of the Supreme Court of South Carolina,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

DAVID RICHARDSON, et al.,

Petitioners,

vs.

J. MEANS McFADDEN, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIOIRARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, David Richardson, Patricia King, Patrick Kelly and Hiram Spain, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit which was entered on October 12, 1977.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is appended hereto, infra at 1a. The panel opinion is reported at 540 F.2d 744 (4th Cir.

1976), and is appended hereto, infra at 16a. The opinion of the district court is unreported and is appended hereto, infra at 42a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 12, 1977.

This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether use of a bar exam by a state with a history of purposeful discrimination in bar admissions violates the Fourteenth Amendment where the exam was adopted for general use only after establishment of a segregated law school, blacks prior to that time being denied admission to state law school, and where the exam has disproportionate racial impact?

2. Whether bar admission procedures violate due process and equal protection where black applicants who received scores higher than those of passing applicants were failed?

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners are four black law school graduates who have satisfied all requirements for admission to the South Carolina bar except being assigned a passing grade on the bar examination.[1] They brought this action seeking declaratory relief, inter alia, that: the South Carolina bar examination discriminates against blacks and cannot constitutionally be used until it is demonstrated to be valid for predicting competent performance in the practice of law[2]; admission procedures were arbitrary

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1. Petitioner David Richardson graduated from Washington College of Law of American University in 1970. Petitioners Patrick Kelly and Hiram Spain graduated from Howard University Law School in 1966 and 1971, respectively, and Petitioner Patricia King graduated from North Carolina Central University Law School in 1969 and was admitted to the North Carolina Bar in 1971. Petitioners brought suit as a class action but class certification was denied.

2. The South Carolina bar exam, thoughout the period under investigation, has included seventeen subjects. The exam takes three days, with a total of six hours of examination each day. From 1969 to 1971, six bar examiners each examined on two or three of these subjects. In 1972, the state began using the multiple-choice Multi-State Bar Examination (MBE) for five subjects; this examination prepared by the National Conference of Bar
(Footnote continued to next page.)

and capricious such that two of the petitioners achieved passing scores on the examination yet were not certified as passing; and, they had been unconstitutionally denied admission to the South Carolina bar.[1]

(Footnote continued from preceding page.)

Examiners, takes one day. The remaining twelve subjects are examined by six examiners. MBE subjects are Contracts, Torts, Criminal Law, Evidence, and Real Property. The subjects always examined by essay are Business Associations, Uniform Commercial Code, S.C. Code Pleading, Federal Practice, Wills and Decedents' Estates, Constitutional Law, Conflicts of Laws, Equity, Insurance, Personal Property, Legal Ethics and Trusts. The tests prepared by the bar examiners have always been either completely, or almost completely, in essay form.

1. Petitioners also charged that the practice of the bar examiners not to allow any review of scores and papers, nor to allow any challenge whatever to the grades assigned, denied due process of law. The district court abstained, advising petitioners to present the issue in the first instance to the Supreme Court of South Carolina. Petitioners did as directed but the state court refused to consider the matter because of the pendency of these proceedings. The respondents cross-appealed from the district court's order insofar as it did not dismiss outright the due process claim. Abstention by the district court was affirmed on appeal. 39a-40a.

Blacks have traditionally been discriminated against in the South Carolina bar and the activities of the organized bar. For example, admission by diploma privilege existed in the state at least as early as 1886, at a time when the sole state supported law school at the University of South Carolina was segregated by law.[1] No black could attend any law school in South Carolina until 1947 when a court action prompted the state to establish a "separate but equal" law school for blacks at South Carolina State College. See Wrighten v. Board of Trustees, 72 F.Supp. 948 (E.D.S.C. 1947). That same year, the diploma privilege was abolished, effective after June, 1950, the effective date apparently being postponed in order to provide to all persons who had already been admitted to law school the benefits of the diploma privilege. The result was that no sooner

1. In 1925, the statute was amended to extend the diploma privilege to any accredited law school in South Carolina, Stat. at Large 1925 (34) 69, for the benefit of Furman University, an all white private institution.

had black citizens become potentially eligible for admission by this method than the method of admission was abolished.

The same pattern of racial motivation appears regarding reading law under the supervision of an attorney. The provisions for reading law as a means of qualifying for the bar antedated the establishment of law schools. The provisions continued in force and effect until shortly after a black applicant qualified for the examination and was subsequently admitted in 1957. Qualification for the examination by reading law was abolished as of November 30, 1957.

A repetition of this pattern occurred more recently with regard to the admission of attorneys to the South Carolina bar by reciprocity. In 1971, a black member of the bar in Oklahoma, Joe Lewis Black, applied for admission by reciprocity and was denied admission on the reported ground that he did not meet the requirements of the rule as to active practice. In January of 1972, the rule authorizing admission by reciprocity was repealed.

The organized bar in South Carolina systematically excluded black attorneys from equal participation until 1970 when black attorneys were first admitted to membership in the South Carolina Bar Association. The Spartanburg County Bar Association in the 1950's had separate mailing lists for social functions, such as dinners for judges visiting from other parts of the state, so that the lone black member of the bar in that county was not to be invited to such functions. Members of the Richland County Bar Association resisted the admission of black attorneys to their association in 1965, and when black attorneys were admitted, a majority of attorneys in that county tried to form a separate lawyers' "club," exclusively white, to perform functions such as conducting the dinners honoring visiting judges. The segregated "club" was abolished only when a member of the association advised the leadership that entertainment of judicial officers by such private organizations of attorneys was a violation of the canons of professional ethics, and promised to bring a formal

ethics complaint if the practice were not stopped.[1]

The South Carolina bar exam excludes a far greater percentage of black than white applicants from admission to practice. Considering all applicants who took the exam from 1968 to 1972, the following table shows the percentage who had passed or failed by the end of 1972:

	Pass	Fail	% Pass
White	709	34	95.4
Black	15	12	55.6

The bar examiners knew of the unequal results of the test, but took no action to investigate these results, nor did they perform any study to demonstrate either

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1. All, or virtually all, members of the class petitioners sought to represent were required by South Carolina law to attend "separate but unequal" racially segregated schools throughout their elementary and secondary education. The youngest of the petitioners, Richardson and King, graduated from high school in 1961, long before the South Carolina schools had, generally, even adopted "freedom of choice" plans. Petitioner Spain, in fact, before attending law school, taught in a segregated school from 1961 to 1968 in Spartanburg, South Carolina. Petitioner Richardson taught in a solely black elementary school in Charleston, South Carolina, in 1965-66.

"criterion-related validity" or "content validity" to demonstrate that the exam was related to the performance of the job of an attorney engaged in the practice of law.

The bar examiners all testified that their procedures and standards for evaluating papers were the same from year to year and that "70" was the passing score. Two petitioners, Spain and Kelly, however, achieved scores of "71" and "70", respectively, the first time they stood the examinations, but were failed. The bar examiners passed several white applicants with similar patterns of scores, including one whose average was rounded to only "69."[1]

District Court

The case was tried on July 16-26, 1973, and the district court entered its order denying relief on October 18, 1973. The court found as a fact that there was no intentional racial discrimination in the assigning of test scores by the individual defendant bar examiners. The disproportionate racial impact of the exam raised a "presumption of discrimination" but was

1. The examiners also commited a number of purely computational errors. In at least one instance, the error may very well have changed the result from passing to failing, although the examiners denied that the error made any difference.

explained, so the court felt, by the fact that certain black applicants had attended Howard University.[1] 49a. The court concluded that the use of the bar exam was constitutional because it had a "rational connection with any applicant's fitness or capacity to competently practice law." 48a.

The Panel Opinion

The panel opinion of the court of appeals affirmed the district court except as to Spain and Kelly, whom it found should have been admitted to the bar. The court held that in evaluating Spain and Kelly's papers "the Bar Examiners acted arbitrarily and capriciously in violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment." 38a. Arbitrariness flowed from inconsistent treatment

1. The court found that "Howard University Law School graduates on a nationwide basis do not fare nearly as well on state bar examinations as do graduates of other accredited law schools." 50a. The court of appeals, however, did not adopt this finding.

given "borderline" papers, the use of vague and subjective written comments accompanying exams in assigning a final grade and the fact that "the correspondence of a score of 70 with even [the examiners] own judgment of minimal competency was little more than fortuitious." 38a.[1]

As to petitioners claim that the exam was invalid, the court held that while "if ... Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina Bar Examination constitutionally invalid," the evidence did not prove deliberate, de jure discrimination,[2] and the exam, for Fourteenth Amendment purposes, bore a "fair and substantial relationship to the purpose of the classification." 21a, 26a.

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1. The following table of examination scores reflects the inconsistent treatment of "borderline" grades by the examiners:

No.	Examiners Scores						Avg.	Pass/Fail
160 6/71	66	67	68	71	78	81	71.8	Fail
128 6/70	66	67	67	72	75	79	71.0	Pass
Spain 6/71	66	66	68	71	72	80	70.5	Fail
121 6/69	66	69	F(69)	71	73	73.8	70.3	Pass
Kelly 2/71	63½	66	69+	70	71	78	69.6	Fail
17 2/70	60	67	71	72	73	74	69.5	Fail
10 2/71	63	66	70	71	73	73	69.3	Pass

2. "[P]erhaps of controlling importance" was the fact that blacks were never by statute excluded from the practice of law in South Carolina. 24a.

The en banc opinion

The court of appeals en banc affirmed the panel opinion but reversed as to the relief given Spain and Kelly. The court held that petitioners' proof of inconsistent treatment of applicants failed to establish "the constitutional discrimination requisite to the granting of individual relief."[1] 4a.

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1. Three judges, including a member of the original panel, concurred but on the grounds that the district court was without jurisdiction to hear the individual claims of Spain and Kelly, the petitioners remedy lying "exclusively with the Supreme Court of the United States" sitting in review of the state court. 14 a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL CONCERNING THE LEGAL STANDARDS APPLICABLE TO PROOF AND REBUTTAL IN RACE DISCRIMINATION CASES.

Petitioners produced evidence of the South Carolin bar's past history of racial discrimination in admitting blacks to the practice of law,[1] together with the disproportionate racial impact of the bar exam. They contended that they established a prima facie case of discrimination in violation of the Fourteenth Amendment unrebutted by clear and convincing evidence by the bar examiners.[2] The court of appeals, however, found the fact that blacks were never prohibited by statute from practicing

1. That history includes discrimination in admissions to law school, abolition of the diploma privilege, reading law and reciprocity at a time when blacks became eligible for bar admission by each of these methods, and discrimination by state and local bar associations, supra, at 6-9.

2. The district court did in fact find that petitioners made out a prima facie case of intentional discrimination relying upon circuit court opinions rendered prior to Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976). 49a.

to be "perhaps of controlling importance" with the result that petitioners had failed to prove a deliberate state scheme of de jure discrimination. 24a[1]

While this Court has held that disproportionate racial impact standing alone does not prove a violation of equal protection, Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 2049 (1976), it has never indicated that an express statutory classification is a requirement for a violation of the Fourteenth Amendment. 96 S.Ct. at 2048: "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute." Rather, the Court has traditionally found discriminatory state action where a statute, otherwise neutral on its face, is applied invidiously to discriminate, Yick Wo v. Hopkins, 118 U.S. 356 (1886); where a clear pattern, unexplainable on grounds

1. The court also noted that 3.4% of lawyers admitted to practice in South Carolina were black and the examiners "cite neutral reasons for all three changes in admission practices." 24a-25a. Petitioners are not required, however, to show that "challenged action rested solely on racially discriminatory purpose" to prevail. Arlington Heights v. Metropolitan Housing Corp., ___ U.S. ___, 97 S.Ct. 555, 563 (1977).

other than race, emerges from the effect of the state action, Arlington Heights v. Metropolitan Housing Corp., ___ U.S. ___. 97 S.Ct. 555 (1977), where the systematic impact of state action is itself such an unequal application of the law as to show discrimination, Castaneda v. Partida, ___ U.S. ___, 97 S.Ct. 1272, 1279-80 (1977); or, where a current racial condition results from past intentional state action. Keyes v. School District No. 1, 413 U.S. 189 (1973).[1] By finding the absence of a statute excluding blacks from the practice of law to be controlling, the court of appeals departed from the legal standards enunciated by this Court as early as 1886 in evaluating claims of racial discrimination.

Having erroneously concluded that petitioners failed to make out a prima facie case of race discrimination, the court of appeals necessarily erred in its finding that the bar exam was constitutional

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1. Accord, Kirksey v. Board of Commissioners of Hinds County, Miss., 554 F.2d 139, 148 (5th Cir. 1977)(en banc).

if it bore a "fair and substantial relationship" to the purpose of the classification. Racial classifications are, of course, tested by a more strict standard. They are constitutional only if justified by a compelling state interest, Loving v. Virginia, 388 U.S. 1 (1967), or rebutted by clear and convincing evidence. Keyes v. School District No. 1, supra, 413 U.S. at 209.

The application by the court below of improper legal standards in evaluating petitioners' claim of racial discrimination denied them the protection of the Fourteenth Amendment.

II. THE COURT BELOW MISAPPLIED BISHOP v. WOOD, 426 U.S. 341 (1976), AND IGNORED SETTLED PRECEDENT OF THIS COURT IN CONCLUDING THAT PETITIONERS HAD FAILED TO PROVE A CONSTITUTIONAL VIOLATION IN BAR ADMISSION PROCEDURES.

The right to due process in bar admissions is constitutionally guaranteed. In Schware v. Board of Examiners, 353 U.S. 232, 238-39 (1957), the Court held that:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.

In accord, Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963): "the requirements of procedural due process must be met before a State can exclude a person from practicing law." And few propositions are more fundamental than that to be consistent with due process, a state may not act arbitrarily or capriciously. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 1071 (1886) ("When we consider the

nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely ... arbitrary power."); O'Brien v. Skinner, 414 U.S. 524, 530 (1974) (declaring unconstitutional as "wholly arbitrary" a New York election statute denying absentee voting to persons confined in the county of their residence); Skinner v. Oklahoma, 316 U.S. 535, 542 (1942) (state sterilization statute unenforceable which draws "conspicuously artificial lines" between persons convicted of offenses); Thompson v. City of Louisville, 362 U.S. 199, 206 (1960)(conviction "without evidence" a violation of due process); Wieman v. Updegraff, 344 U.S. 183, 191 (1952)("Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."); Johnson v. Robison, 415 U.S. 361, 375 (1974) (legislative classification "must be reasonable, not arbitrary," quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); Frontiero v. Richardson,

411 U.S. 677, 683 (1973)("patently arbitrary" legislative classifications may not survive constitutional analysis).

The requirement of rational decision making with a basis in fact has been specifically applied by this Court to bar admissions procedures. Schware v. Board of Examiners, supra, 353 U.S. at 239: "Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards." In accord, Estep v. United States, 327 U.S. 114, 122 (1946) concluding that administrative action with "no basis in fact" is unconstitutional.

Here, the decision making process was wholly arbitrary and lacked a basis in fact. Petitioners Spain and Kelly were denied admission to the bar while applicants who scored lower than they were admitted. Arbitrariness was patent, not simply from the inconsistent treatment given applicants, but from the use of vague and subjective standards in assigning grades and the "fortuitous" designation of a passing score.

The court of appeals, however, relying exclusively upon Bishop v. Wood, 426 U.S. 341 (1976), reasoned that "if the bar examiners made a mistake in one or more individual cases" a denial of due process or equal protection would not be made out. 3a-4a. The court then concluded: "we simply do not think that Spain and Kelly proved their case."[1] 6a. Bishop stands for the proposition that in the absence of a liberty or property interest, discharge from employment, even for an erroneous reason, does not violate due process. But Bishop could never be stretched for the proposition that the Fourteenth Amendment no longer requires rational decision making with a basis in fact where protected interests, such as those here, are involved.

There was no warrant for the extension of Bishop v. Wood, supra, in this case, nor the denial of Fourteenth Amendment protection to petitioners in violation of settled precedent of this Court.

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1. The court also held that petitioners had the burden of showing "all of the circumstances" surrounding the disparate treatment of applicants. 5a. Petitioners established as many of the "circumstances" as they could, 33a-38a, but in cases such as this where there is proof of inconsistent treatment, and facts are known only by respondents, it is the later who must fill any "factual vacuum" which may exist. Avery v. Georgia, 345 U.S. 559, 562 (1953).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2512

David Richardson, et al.,
Appellants,

v.

J. Means McFadden, et al., etc.,
Appellees.

No. 73-2513

David Richardson, et al.,
Appellees,

v.

J. Means McFadden, et al., etc.,
Appellants.

Appeals from the United States District Court for the District of South Carolina, at Charleston. Sol Blatt, Jr., District Judge.

Reargued March 15, 1977 Decided October 12, 1977

Before HAYNSWORTH, Chief Judge, BOREMAN, Senior Circuit Judge, WINTER, CRAVEN,* BUTZNER, RUSSELL, WIDENER, and HALL, Circuit Judges, sitting in banc on resubmission.

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*Judge Craven died before this opinion was prepared.

PER CURIAM:

We granted rehearing in banc to reconsider the issues decided by a panel of the court in Richardson v. McFadden, 540 F.2d 744 (4 Cir. 1976). There, in an action for declaratory and injunctive relief brought by four black law school graduates who had satisfied all requirements for admission to the South Carolina Bar, except that they received failing scores on the bar examination, the panel decided that the district court properly denied relief except for the individual claims of Spain and Kelly. With respect to them, the panel concluded that the Law Examiners had acted arbitrarily and capriciously, and it directed the district court to order them to be certified as having passed the South Carolina Bar.

I.

Except with respect to the individual claims of Spain and Kelly, we see no merit in plaintiffs' various contentions for the reasons assigned by the panel.

II.

With regard to the individual claims of Spain and Kelly, we conclude, in disagreement with the panel, that the district court correctly denied relief.

At the outset, we recognize that a jurisdictional question is raised by the assertion of individual claims for relief by Spain and Kelly, i.e., whether, in judging the intellectual fitness of applicants to practice law, the Law Examiners performed a judicial function on behalf of the South Carolina Supreme Court, so that under such precedents as Doe v. Pringle, 550 F.2d 596 (10 Cir. 1976), cert. denied, ___ U.S. ___ (1977), and McKay v. Nesbett, 412 F.2d 846 (9 Cir. 1969), cert. denied, 396 U.S. 960 (1969), we should conclude that the district court lacked subject matter jurisdiction to review the denial of admission to the bar. We are divided on how this issue should be decided, but we find it unnecessary to debate or resolve our differences because a clear majority of us agrees that, even if the district court had subject matter jurisdiction, the proof will not suport the conclusion that Spain and Kelly are entitled to individual relief.

Their claim to relief is founded upon due process and equal protection claims. Before turning to the factual basis of their claims, we stress that our function is not just to determine if the bar examiners made

a mistake in one or more individual cases; it is to determine if there has been a denial of due process or of equal protection. Not every erroneous determination mounts up to a denial of due process or equal protection. Bishop v. Wood, 426 U.S. 341, 349-50 (1976).

Factually, Kelly and Spain showed that other applicants at other times appeared to have received more favorable treatment in grading than that which was afforded them. See table at 540 F.2d at 750. Specifically, Spain, who was a June, 1971, applicant having an average score of 70.5 and having been failed by three examiners, points to applicant 129, a June, 1970, applicant having an average score of 71.8 and also having been failed by three examiners, who was passed. Kelly, who was a February, 1971, applicant having an average score of 69.6 and having been failed by three examiners, points to applicant 10, also a February, 1971, applicant who was passed with an average score of 69.3 but who was failed by only two examiners.

We do not think this proof establishes that constitutional discrimination requisite to the granting of individual relief. In

the case of Spain, the comparison urged on us is of different years. While the mere fact of different years does not make the comparison inapposite, all of the circumstances which make the two instances comparable were not shown. Moreover, the record does not show that in grading Spain the examiners had before them the record of what had been done the year before. In the case of Kelly, the fact that he was failed by three examiners serves to distinguish his case from the asserted analogue where the applicant was failed by only two examiners. The further fact that a February, 1970, applicant (No. 17) was failed with an average of 69.5 after having been failed by only two examiners does not destroy the distinction. Although it occurred in a different examination from the one about which Kelly complains, it may show discrimination with reference to 17; but Kelly can hardly advance his cause as a result of a possible due process violation to another. Significant also, with respect to Spain and Kelly, are the facts that of the aggregate 828 examinations given during the eight times that the bar examination was administered over a four-year period, only these

two examples of alleged discrimination were proved, and that Spain and Kelly continued to fail on subsequent reexaminations. Succiently stated, we simply do not think that Spain and Kelly proved their case.

Since we conclude that there was no error in the judgment of the district court on any of the grounds asserted, its judgment is

A F F I R M E D.

HALL, Circuit Judge, concurring in the result:

While I concur in the result reached in this case, I do so because I believe that the district court was without subject matter jurisdiction to review the questions relating to the individual admissions to the bar of Spain and Kelly. Settled precedents, I believe, support my views regarding the district court's lack of subject matter jurisdiction.

In South Carolina, the exclusive jurisdiction to pass upon the qualifications of applicants is vested in the South Carolina Supreme Court by both the state constitution and by statute. S.C.CONST. art. V, § 4;

S.C.CODE § 56-96. By administering the bar examination and judging the intellectual fitness of applicants to practice law, the Law Examiners perform a judicial function on behalf of the South Carolina Supreme Court.[1] The South Carolina Supreme Court thus exercises judicial power within the scope of its subject matter and personal jurisdiction when it acts upon the admission of applicants to the state bar. And while that court is not required to admit an applicant to the South Carolina Bar simply

1. See Deposition of J. Means McFadden, App. at 428-29:

> Well we [Law Examiners] are subject to the control of the Supreme Court, and we take no action of an affirmative nature without first conferring with the Supreme Court and getting their approval of it. * * * [W]e are subject to their supervisicn in every thing we do. But to the extent that we have to formulate questions, give the examination, grade the papers, yes, we have to do that on an individual basis. There is no other way we can do it. [However, before any changes were made in the scheme of the examination], we got the approval of the Supreme Court before we ever put in changes.

because the Bar Examiners have certified that he has passed the bar examination,[2] nevertheless the failure to obtain such a certification does preclude admittance to the bar.

Many states have statutorily established a formal procedure for petitioning the states' highest court for review of an adverse determination by a board of bar examiners who failed to certify that an applicant has passed a bar examination. A statutory provision such as this did not exist in South Carolina during the time relevant to this case; however, petitions by aggrieved bar applicants had been made to and considered by the South Carolina Supreme Court.[3] Final action on a application to the state bar is by the South Carolina

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2. However, the record does not reflect any instance when the South Carolina Supreme Court refused to follow the recommendations of its Law Examiners in admitting applicants to the bar.

3. After institution of this suit, the South Carolina Supreme Court voluntarily did establish by rule procedures for the review of failing papers. See Rule 11, RULES FOR THE EXAMINATION AND ADMISSION OF PERSONS TO PRACTICE LAW IN SOUTH CAROLINA (effective date - February 10, 1975).

Supreme Court, whether the action taken is expressed or implied;[4] and review from an adverse decision is secured by petitioning the Supreme Court of the United States for certiorari. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Theard v. United States, 354 U.S. 278 (1957). Three circuits are in accord. See Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), cert. denied, ___ U.S. ___, 97 S.Ct. 2179 (1977); Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969), cert. denied, 396 U.S. 960 (1969); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962).

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4. See American Civil Liberties Union v. Bozardt, 539 F.2d 340 (4th Cir. 1976), cert. denied, 97 S.Ct. 639 (1976), where a final (appealable) state adjudication of a disciplinary proceeding was said not to occur until it could be demonstrated that the South Carolina Supreme Court either expressly decided the question or acquiesced in the decision of the Board of Commissioners on Grievances and Discipline of the South Carolina Bar.

The fictitious "Jane Koe" in Bozardt, in reality Ms. Edna Smith, subsequently did seek a direct review of the private reprimand administered by the Board of Commissioners on Grievances and Discipline. The Supreme Court of South Carolina reviewed the case but ordered a public reprimand. Matter of Smith, 233 S.E.2d 301, 306, (S.C. 1977).

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The United States Court of Appeals for the Tenth Circuit has recently considered this particular jurisdictional issue in Doe v. Pringle, supra. There, a frustrated bar applicant had brought a civil rights action challenging the state supreme court's denial of his application for admission to the bar, despite a favorable recommendation of the bar committee. Upholding the district court's dismissal of the action, the Tenth Circuit ruled that a federal court was without subject matter jurisdiction to review the denial of admission to the bar even though plaintiffs' challenge was anchored to an alleged deprivation of federally protected due process and equal protection rights.

Drawing from the district court's ruling, the Doe court noted that there is a subtle but fundamental distinction between two types of claims which a disappointed bar applicant might bring to federal court:

> The first is a constitutional challenge to the state's general rules and regulations governing admission;

(footnote continued from preceding page)

An appeal to the Supreme Court of the United States was then filed. In Re Smith, No. 77-56, 46 U.S.L.W. 3041. It is currently pending.

> the second is a claim based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission.

Doe, 550 F.2d at 597.

Thus,

> [W]hile federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules [citations omitted], such is not true where review of a state court's adjudication of a particular application is sought. * * * [T]he latter claim may be heard, if at all, exclusively by the Supreme Court of the United States. . . . [relying on the 'Thread Doctrine' announced in Theard v. United States, 354 U.S. 278 (1957)].

Doe, 550 F.2d at 597.

The Eighth Circuit, in Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971) dealt with a plaintiff who had twice failed the Arkansas bar exam, who sued the Board, and others, seeking injunctive relief and based jurisdiction upon 28 U.S.C. §§1343(3) and 1331(a). He sought to state a claim under 42 U.S.C. § 1983. The

district court initially expressed doubt as to its subject matter jurisdiction but, dismissed on nonjurisdictional grounds. The Court of Appeals noted that the suit properly could have been dismissed on jurisdictional grounds, 438 F.2d at 701, and then noted that:

> " . . . plaintiff's remedy if any lies in presenting his grievance to the Arkansas Supreme Court. If the ruling there is adverse to him, he may apply for certiorari to the United States Supreme Court in the manner as was done in Schware, Konigsberg and Theard. As the trial court properly stated, it is not an appellate court and cannot in such a case as this review State court actions."

Feldman. 438 F.2d at 704.

Finally, in MacKay v. Nesbett, supra, the Ninth Circuit was faced with a challenge to the action of a majority of the Justices of the Alaska Supreme Court who had entered disciplinary orders suspending MacKay from the practice of law for a period of one year. Relying upon Theard and Gately, supra, and other precedent in support of the Theard doctrine, the court said:

> [O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar

> may be reviewed only by the Supreme Court of the United States on certiorari to the state court and not by means of an original action in the lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems.

MacKay, 412 F.2d at 846. Emphasis added.

While we are aware that there is some authority to the contrary in the Seventh and perhaps the Fifth Circuits,[5] and while we are fully appreciative of the desirable goal of avoiding, if possible, the creation of a conflict among our sister circuits, I nevertheless believe we should follow the teachings of Doe, Feldman and MacKay, and accordingly, I would hold that the district court should have dismissed the claims of Spain and Kelly regarding their allegations of having been wrongfully deprived of passing grades on the South Carolina Bar

5. See Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 477 (7th Cir. 1974):

> Plaintiff, of course, did allege that defendants acted arbitrarily in grading his examination. There may very well be situations in which a capricious denial

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Examination. By failing to admit Spain and Kelly to the South Carolina Bar, the South Carolina Supreme Court had acquiesced in the Board of Law Examiners' recommendation to not license them. Review of this denial lies exclusively with the Supreme Court of the United States.

Judge Widener authorizes me to state that he joins in this opinion.

BOREMAN, Senior Circuit Judge, concurring specially in the result:

As a Senior Circuit Judge I was a member of the panel of three which considered and decided the appeal. Having served on that panel I was qualified to participate in the rehearing in banc which was ordered by the court.

Upon the rehearing in banc I have been persuaded that the jurisdictional question raised was not accorded the serious consideration by the panel to which it was entitled.

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by state officials may give rise to a federal remedy. (dictum).

See also Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976).

From the arguments presented, in briefs and orally, and upon careful review of the opinions of other highly respected circuit courts of appeals I am convinced that the federal district court should have dismissed this action for lack of subject matter jurisdiction.

Therefore, I join Judge Hall in his opinion in which he concurs in the result and for the reasons as set forth by him therein.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2512

David Richardson, et al.,

Appellants,

versus

J. Means McFadden, et al., etc.,

Appellees.

- - - - - - - - - - -

No. 73-2513

David Richardson, et al.,

Appellees,

versus

J. Means McFadden, et al., etc.,

Appellants.

Appeals from the United States District Court for the District of South Carolina, at Charleston. Sol Blatt, Jr., District Judge.

Argued April 8, 1976 Decided Aug. 30, 1976

Before BOREMAN, Senior Circuit Judge, CRAVEN, Circuit Judge, and HADEN, District Judge*

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*Sitting by designation.

CRAVEN, Circuit Judge:

This action for declaratory and injunctive relief was brought by four black law school graduates[1] who had satisfied all requirements for admission to the South Carolina Bar except that they received failing scores on the bar examination. They challenge the constitutionality of the South Carolina Bar Exam as applied generally to black applicants. Appellants Spain and Kelly also attack its validity as applied to them personally.

In the district court appellants alleged and undertook to prove: (1) direct and purposeful discrimination against blacks by the State Board of Law Examiners in assigning grades to their papers; (2) failure of the State to demonstrate that the bar examination is job related as opposed to simply a measurement of general educational preparation; (3) denial of due process of law in the failure of the Bar Examiners to provide an established procedure whereby review of, and challenge to,

1. David Richardson was graduated from Washington College of Law of American University in 1970. Patrick Kelly and Hiram Spain received law degrees from Howard University in 1966 and 1971, respectively. Patricia King was graduated from North Carolina Central University Law School in 1969.

the assignment of a failing score could be had; and (4) arbitrary and capricious application of the Examiners' own standards and criteria to the examinations of Spain and Kelly, with the result that they were denied passing scores.

The district court, after trial, rejected appellants' arguments, except as to the claim that due process was denied unsuccessful applicants by the failure of the Bar Examiners to provide a system for review of failing papers. Judge Blatt abstained as to that issue until appellants had presented it to the South Carolina Supreme Court. On appeal, the plaintiffs below assign error as to all adverse rulings except their contention that tests were graded in an intentionally racially discriminatory manner. The Bar Examiners cross-appealed the court's decision to abstain from decision rather than dismissing outright the due process challenge to the absence of a failing test challenge procedure.[2]

2. On appeal, the Examiners argue that this court has no jurisdiction since generally only the Supreme Court can review decisions of a state court, and contend that the individual Examiners are immune from suits challenging the exercise of their judical (footnote continued to next page)

We affirm the district court, except as to the individual claims of Spain and Kelly.

I.

Appellants' main challenge to the South Carolina Bar Examination is that it is not job related. They argue that the State Bar's past history of racial discrimination in admitting blacks to the practice of law and the diporportionate impact of the examination on blacks places on the Examiners the burden of showing that the exam is job related, and that in this context the standards for judging job relatedness should be those of Title VII of the 1964 Civil Rights Act[3] rather than traditional Fourteenth Amendments tests. Appellants contend that to be constitutional the test in general must be shown to measure skills relevant to the practice of law, and the passing score must be selected so as to

(footnote continued from preceding page) function. While both propositions are correct in principle, it is crystal clear that in giving and grading examinations and certifying passing scores the Board of Bar Examiners neither renders judicial decisions nor exercises judicial functions.

3. 42 U.S.C. § 2000e et seq.

draw the line at minimal professional competency. While the main thrust of their argument goes to establishing Title VII standards as applicable to the bar examination, they contend that, regardless of the standard employed, the Examiners have failed to demonstrate the requisite job relatedness.

The district court, examining the question solely under the criteria of the Fourteenth Amendment, held that "the South Carolina bar examination as presently administered has a rational connection with any applicant's fitness or capacity to competently practice law in this state." App. 44. He made no explicit finding concerning the passing score, probably because the question was not presented to him in those terms, but we believe that, in ruling that the bar examination "as presently administered" was "job related," he meant to indicate approval of both the test in general and the selection of a passing score.

But if Title VII's standards for job relatedness are applied, the test used must be "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements

of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated.'" Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). While the Bar Examiners do not concede that they would lose under this requirement, we believe the record is inadequate to demonstrate either "criterion" ("predictive"), "content", or "construct" validity under professionally acceptable methods.[4] Thus, if we were to determine that Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina Bar Examination constitutionally invalid.

Appellants agree that Title VII does not apply to the bar exam by its own terms. But they point out that in Walston v. County School Board, 492 F.2d 919 (4th Cir. 1974), we incorporated Title VII standards into the Fourteenth Amendment equal protection

4. For a discussion of the meaning of these terms see, e.g., Douglas v. Hampton, 512 F.2d 976, 984 (D.C. Cir. 1975); Bridgeport Guard, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1337-38 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975).

guarantee in the context of past, state-sanctioned racial discrimination and the disparately adverse impact of the test upon blacks. So we did. See also United States v. Chesterfield County School District, 484 F.2d 70 (4th Cir. 1973).

However, in Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), decided after oral argument in this case, the Supreme Court limited our Walston approach,[5]

5. In disapproving numerous cases from the lower federal courts that reached the contrary conclusion, the Court failed to cite either of our cases upon which appellants chiefly rely. Id. at 4793 n. 12. This omission might be interpreted to mean that disproportionate impact upon blacks in the context of historically state-sanctioned discrimination establishes "discriminatory purpose." But at least two other explanations may be given for the Court's failure to cite either Walston or Chesterfield County.

Inadvertent omission is, of course, possible. Also, the Court may have considered these "school cases" --part of the "special context of school desegregation cases" upon which Keyes v. School District No. 1, 413 U.S. 189, 208 (1973), relied. In that case, the Supreme Court cited with approval our holding in Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 192 (4th Cir. 1966)(en banc), that "in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.'" Id., at 189. Thus, Walston, which relied heavily upon Chambers, might be read as simply a part of that "special context," as the Examiners contend, or much more broadly, as appellants urge.

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holding that, where discriminatory purpose by the state is not proven, it is inappropriate to "adopt this more rigorous standard [Title VII] for the purposes of applying the Fifth and the Fourteenth Amendments ...." Id. at 4794.

To prove discriminatory purpose, appellants rely on circumstantial evidence generated by the chronological juxtaposition of three changes in admission practices to the State's Bar. The first was the elimination of "diploma privilege", which allowed graduates of the State's accredited law school to gain automatic admission to the Bar. This path was eliminated in 1950, three years (the normal law school term) after a "separate but equal" law school was started at South Carolina State College, a black school. Appellants argue the same pattern was followed as to the practice of "reading law." This avenue for admission to

(footnote continued from preceding page)

However, we need not in this case decide either the scope of Walston or the degree to which it survived Davis, since there is lacking here a history of invidious discrimination sufficient (with disparate impact) to trigger its application.

the Bar was eliminated in 1957, "coincidentally" shortly after a black applicant used this method. Finally, they contend that reciprocity was abolished in January 1972, not long after a black member of the Oklahoma Bar applied under the reciprocity rule for admission to the Bar.

The Bar Examiners respond with three points. First, they note, and appellants do not contend otherwise, that there have never been laws or rules of court prohibiting blacks from practicing law in the State or imposing different standards based on race. This is important -- perhaps of controlling importance. Second, it is statistically clear that admission to the State's Bar has been relatively open to blacks -- according to the 1970 Census, South Carolina has the highest proportion of black lawyers in its Bar of any state in the nation.[6] Finally, they cite neutral reasons for all

6. The District of Columbia has a higher percentage. Of D.C. lawyers, 9.4% are black, as compared with 3.4% in South Carolina. North Carolina is next with 3.3%, followed by Mississippi with 2.8%. Defendants' Exhibit A. App. - Exhibits at 720.

three changes in admission practices.[7]

We think it clear that the evidence falls short of proving (unlike the school cases) a deliberate state scheme of de jure discrimination. Thus, despite proof of disparate impact, the application of Title VII standards is not appropriate. Davis, supra.

Job-Relatedness Under the Equal Protection Clause

We agree with the Fifth Circuit in Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3714 (U.S. June 14, 1976),[8] that under the Equal Protection Clause of the Fourteenth Amendment

7. They contend that as early as 1940 the South Carolina Bar Association was on record supporting the American Bar Association effort to abolish both the "diploma privilege" and "reading law." Each change, they contend was simply part of the effort to upgrade the educational qualifications of those admitted to the practice of law in the State, and each predated any possible racial motivations for the changes. The Examiners further note that both changes were in line with national trends. As to "reciprocity," the Examiners contend that the law was changed "in order to curb an increasing flow of semi-retired lawyers into the state not sufficiently skilled in the principles and practice of law in South Carolina."

8. Cited with approval in Washington v. Davis, supra, 44 U.S.L.W. at 4793 n. 12.

the issue is still whether the examination is job related, albeit a less demanding inquiry. "The hallmark of a rational classification is not merely that it differentiates, but that it does so on a basis having a fair and substantial relationship to the purpose of the classification." Id. at 1099. And here the purpose of the classification is to distinguish between persons demonstrating minimal competence to practice law and those lacking such knowledge and skill.

The testimony introduced at trial on the validity of the test questions consisted primarily of testimony by the individual Bar Examiners. Each testified to basically the same facts: (1) that he is a successful practicing lawyer in the State and, from observation and experience, understands the skills necessary to practice competently; (2) that he has examined sample questions prepared by the National Council of Bar Examiners and/or discussed question formulation with others; and (3) that he designed the questions he placed on the Bar so as best to determine whether the applicant possess the minimal level of competence necessary to practice law in the State. In

addition, the Examiners' experts, Statler and Bernreuter, testified that they had performed correlation studies between performance on the bar examination and performance in law school as measured by the law school grades. Both experts testified that, in their opinion, the results demonstrated the "content validity" of the bar examination, where "content" is defined as law school performance.[9] Appellants did not challenge the existence of such correlation; they only attacked its significance and argued that it was irrelevant to any then established procedure for showing content validity. They contend that, absent a job analysis, which was not performed here, there can be no demonstration of content validity.[10]

In Washington v. Davis, supra, the Supreme Court held that, at least in validating admission to a police training

9. See App.-Exhibits at 618-21; App. 851-54, 871-72, 972-77.

10. See App. 865-66, 1026-27. See also Equal Protection Challenge to the Bar Examination, 1975 Ariz. St. L. J. 531 (1976).

program, a "positive relationship between the [admission] test and training course performance [is] sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer." 44 U.S.L.W. at 4795. In fact, the Court found this relationship to be "the much more sensible construction of the job relatedness requirement." Id.

While the Court's treatment of the job relatedness requirement in Washington v. Davis has no direct application to professional licensing examinations because of the differing state interests involved, we believe the Court's general reasoning gives substantial support to the Examiners' argument that under the Fourteenth Amendment the relationship between law school performance and the bar examination is significant in establishing job relatedness.[11]

11. If it were carried to its logical extreme, seldom the path of the law, the Court's opinion on this point surprisingly might invalidate almost all state professional examinations. If the only demonstration of job relationship required is that it has a positive relationship to training course performance--e.g., law school--then why does not training school performance itself demonstrate that the applicant is fit to practice his profession? It is certainly clear that nothing correlates better with training school performance than training school
(footnote continued to next page)

We believe that this statistical evidence plus the other efforts of the Examiners to intelligently relate the examination questions to the skills involved in the practice of law are sufficient to satisfy the demands of the Fourteenth Amendment.

Whether the passing score selected by the Bar Examiners bears "a fair and substantial relationship" to the determination of minimal competency presents a much more difficult question. In United States v. North Carolina, 400 F.Supp. 343 (E.D.N.C. 1975)(three-judge court), the district court, in a similar context, held that to satisfy the demands of the Equal Protection Clause the cut-off score selected must be reasonably related to minimal competency, and it held invalid the minimal passing score selected by North Carolina for a National Teacher Examination because of a total absence of evidence showing it to be related to minimal teaching competency.

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performance itself. An applicant for the Bar who has graduated from an accredited law school arguably may be said to stand before the Examiners armed with law school grades demonstrating that he possesses sufficient job-related skills. Why, then, any bar examination at all?

In this case, some evidence was introduced to validate the cut-off score of 70 used by the Examiners, but it was very subjective and general in nature and hardly acclaimed by the educational testing experts who testified.[12] Perhaps the testimony most supportive of the validity of the cut-off score was provided by Examiner David Freeman, who described his grading procedures as follows:

> My own approach is that, preliminary to the grading process, to go back to the exam question and in studying through them very carefully, I make a mental assessment of the importance to be attached to each one. I do not go through, for my own purposes: I feel that it's a mechanical process of assigning a point value to each question. I then read the examinations. I treat them not as questions to which so many points were assigned to this or to that issue of this question, but as a totality and assign to that paper a grade which I think is reflective of the student's evidence of ability in answering the whole.
>
> Q. What form would that grade take, a letter grade?
>
> A. It would be a numerical grade. And I think, for my own testing purposes, the magic passing point is 70, and I range upward or downward through that.

12. See App. 715-16.

> . . . .
>
> Q. All right sir, as I understand it, you read the entire paper and then assign a single numerical grade, with 70 as passing?
>
> A. That is right.
>
> . . . .
>
> Q. As I understand it, you don't attempt to assign points to any particular portion of the test?
>
> A. Not in a numerical fashion. It is a matter, in the preliminary process, of giving a mental assessment of importance to this question, or lesser importance to this question, or lesser importance to that question. When I have finished grading a paper, what I would have is one grade that I put on there.

App. - Exhibits at 325-26.

Other Examiners employed a very mechanical system, assigning points to particular parts of questions, summing those points, and then in some cases obtaining the 70 cut-off line simply by raising the highest score to an "A" or perfect score.[13] We tend to agree with appellants' expert that, if this

13. See, e.g., Deposition of J. Means McFadden, App.- Exhibits at 266:

> I took the top man and I figured what an A paper would be and how many points I'd have to add to his score to get him an A paper, and I gave him that number of points to get him an A. And I gave everybody else the same number of points.

second system is utilized in the precise manner described by the Bar Examiners, it would be almost a matter of pure luck if the "70" thereby derived corresponded with anybody's judgment of minimal competency.

But absent professional validated, administered, and evaluated examinations, it is not clear that to require grading along the lines discussed by Freeman rather than the more mechanical and arbitrary method used by McFadden is anything more or less than to demand greater subjectivity. It is not at all certain which of these two, both of whom are competent lawyers but laymen at question design and evaluation, generates numerical scores which more accurately reflect their "true" evaluation of competency.

In view of the fact that all Examiners both designed their exams and assigned scores so as to indicate their judgment as to minimal competency, we cannot find the results obtained so unrelated to the State's objectives as to violate the Equal Protection Clause.[14]

14. That is not to say that such an unprofessional approach leaves us with much confidence in the precise numerical results obtained. It is unfortunate the State has not combined the advantage of utilizing Bar Examiners who are practicing professionals with consultation and guidance from experts in question evaluation.

II.

Appellants Spain and Kelly argue that individually their rights under due process and equal protection were denied in that, through arbitrary and capricious application of the Examiners' own standards, their "borderline" papers were certified as "failing." It is beyond question that the Bar Examiners are subject to the requirements of the Due Process and Equal Protection Clauses in the conduct of their duties. As the Supreme Court stated in Schware v. Board of Examiners, 353 U.S. 232, 238-39 (1957):

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Four-Amendment. . . .

There is no more fundamental proposition in our law than that a state may not act arbitrarily and capriciously to deprive a citizen of "liberty" or "property" interests. Such is the basic thrust of Spain and Kelly's argument, and it is clear that if their allegations are accurate they are entitled to relief.

Kelly and Spain base their case on the following table of examination scores:

Applicant		Scores for each of 6 examiners						Average	Pass/Fail
#160	June, 1971	66	67	68	71	78	81	71.8	Fail
#128	June, 1970	66	67	67	72	75	79	71.0	Pass
Spain	June, 1971	66	66	68	71	72	80	70.5	Fail
#121	June, 1969	66	69	F(69)	71	73	73.8	70.3	Pass
Kelly	Feb., 1971	$63^{1}/_{2}$	66	69+	70	71	78	69.6	Fail
#17	Feb., 1970	60	67	71	72	73	74	69.5	Fail
#10	Feb., 1971	63	66	70	71	73	73	69.3	Pass

Appellants' Reply Brief at 22.

Their basic argument is that under standard Bar Examiner practice of "rounding up" grades of .5 or better to the next whole number both had passing cumulative scores--Kelly 70 and Spain 71. The Examiners' response is that under their practices a person might "fail" the Bar even though he had a cumulative passing score if he had failed three or more of the individual Examiners. In those cases, the decision would be based, the Examiners testified, upon the "configuration of scores" and Examiners' notes containing remarks on the general quality of papers. We understand that during these proceedings the actual exam papers were not before the Examiners, and there was no review of the applicant's performance other than examination of the pattern of the grades and whatever notes the Examiners may have made concerning each paper.

But, appellants point out, individuals who had lower cumulative totals and not obviously different "configuration of scores" were passed. As to Spain, the Examiners' basic response is that one cannot expect perfection in the difficult borderline cases. As to Kelly, they argue that no one

who failed three Examiners had a lower score and was judged to have passed the exam. They contend that individual # 10 "passed because he passed four examiners," indicating that passing would be automatic in such sitautions. Brief for Appellee at 63 n. 37. That, at least, was their response before applicant # 17 was brought to their attention. He passed four Examimers, had a higher cumulative score than # 10, and still failed the examination. We therefore think the scores are comparable since there is no consistently applied distinction between them.

At oral argument, the Examiners offered a further explanation of how an individual may receive a passing grade when his cumulative total was lower than another applicant who failed. They tell us that written comments often accompany borderline scores and are employed to make these difficult decisions. In this fashion, they explain their different treatment of two applicants in 1973 (one passed and the other failed) who both had cumulative averages of 69 2/3. The one who passed the exam failed three Examiners and, in addition,

failed the Multistate portion[15] of the exam. The who who failed it also failed three Examiners but passed the Multistate portion.

The Examiners told us that this was perfectly reasonable because comments on the grading sheets corresponded with the ultimate results. The one who failed was noted to be "poor in expressing himself" and "didn't seem to have an understanding of legal principles." The one who passed was "marginal plus" and "had some good answers." We find reliance on these comments irreconcilable with the Board's contention that numerical scores are used to capture precise gradations in performance. It is not possible to pursue the goal of objectivity and also put ultimate reliance on subjective notes as general and vague as those cited above.

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15. The Multistate Bar Examination (MBE) is an "objective" multiple-choice examination constructed by the National Conference of Bar Examiners. It was first given in South Carolina in February 1972.

We would be concerned about this general inconsistency of treatment of scores in arriving at an overall result even if the scores from each Examiners were absolutely precise. However, as noted in the previous section, they are far from precise as to any Examiner, and for three Examiners, who raised each score by an arbitrary number of points, the correspondence of a score of 70 with even their own judgment of minimal competency was little more than fortuitious. On these facts, we hold that, as to Spain and Kelly, the Bar Examiners acted arbitrarily and capriciously in violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Accordingly, on remand, the district court will order that they be certified as having passed the South Carolina Bar.[16]

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16. Appellants argue on appeal that the district court erred in refusing to certify this as a class action. While we believe that Judge Blatt might have properly done so (see, e.g., Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 645 (4th Cir. 1975)), given our disposition of this case, we find the error, if any, to be harmless.

III.

The Bar Examiners appeal Judge Blatt's refusal to dismiss appellants' claim that lack of an established process for challenging exam results violated due process. The Examiners argue, first, that while there was at the time the suit was begun no such "express provision for review" or "ascertainble basis upon which to challenge bar examination results," there was no denial of due process because the State's Supreme Court, under its exclusive jurisdiction of admission to the Bar and under its inherent powers, could "review actions of the law examiners and ... make final determination of who will and will not be admitted to" the Bar. Brief for Appellee at 35. They contend that no other rule or court action was required to guarantee an opportunity for review, and, as a result, due process is satisfied.

We cannot determine on this record whether adequate review was then available. We are not told whether such a system has ever operated. Under such circumstances, we find nothing improper in the district court's order which deferred action on this claim until the question was presented to the State

Supreme Court. It is true that Judge Blatt's order may be read to indicate his tentative belief that the establishment of new review procedures may be necessary. But cautiously he deferred decision in favor of application to the State Supreme Court, which was the one body which could definitely determine what, if any, review was available and appropriate under state law.[17]

As a second argument, the Examiners contend that no review procedure was necessitated because the right of reexamination satisfied the requirements of due process. See Tyler, supra, at 1103-05; Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474 (7th Cir. 1974).[18] They contend that, if a person actually possesses the requisite skills, it will certainly be demonstrated by at least one of a series of reexaminations, and that the chance "'the same individual would be the victim of error after two reexaminations is literally one in a million.'" Brief for Appellees at 38, citing Tyler, supra, at 1104.

17. Because of the pendency of this appeal, the South Carolina Supreme Court has stayed action on appellants' petition for admission to the Bar and review of their examination scores.

18. See also Comment, Review of Failing Bar Examinations: Does Reexamination Satisfy Due Process?, 52 Bos. U.L. Rev. 286, 300-01 & n. 114-15 (1972).

To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and, nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that delay in getting it is an injury.

It is true that some courts have held that reexamination is a more effective remedy than review because the administrative burden of allowing challenges was perceived to be too great.[10] We are not persuaded.[20].

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

19. It is significant, we think, that after initiation of this suit the State voluntarily established procedures for review of failing papers. Furthermore, the administrative burden argument has not been made by the State in its brief.

20. In both Tyler and Whitfield, the state bar under challenge allowed the applicant unlimited opportunity to retake the bar. In South Carolina at the time of the district court's opinion in this case, an applicant was allowed only three opportunities to take the examination.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

[Filed Oct. 18, 1973]

DAVID RICHARDSON, PATRICIA KING, PATRICK KELLY and HIRAM SPAIN,	)	
Plaintiffs,	)	Civil Action No. 72-1219
-v-	)	
J. MEANS MCFADDEN, MORRIS D. ROSEN, C.W.F. SPENCER, ROBERT D. SCHUMPERT, DAVID L. FREEMAN and ALBERT L. JAMES, JR., individually and as members of the State Board of Law Examiners; and MISS FRANCES SMITH, Clerk of the Supreme Court of South Carolina,	)	O R D E R
Defendants.	)	

This is an action for declaratory and injunctive relief, brought pursuant to 42 U.S.C. 1981, et seq., in which the plaintiffs, alleging violation of rights guaranteed them under the Equal Protection and Due Process Clauses of the United States Constitution, ask this court to declare as discriminatory and unconstitutional the practices by which the defendant members of the State Board of Law Examiners evaluate applicants for admission

to the Bar of the Supreme Court of South Carolina. This court refused to permit this litigation to be brought as a class action, and the four plaintiffs thus sought an order for themselves that would admit them to the practice of law in this State without having passed the semi-annual bar examination which is conducted by the aforementioned defendants for, and on behalf of, the Supreme Court of South Carolina, pursuant to the authority granted that Court by Section 56-97(b) of the 1962 Code of Laws of South Carolina, as amended.

The plaintiffs are all black and are graduates of several different law schools. Plaintiff Richardson graduated from Washington College of Law of American University in 1970, after having previously attended Howard University Law School; plaintiffs Kelly and Spain graduated from Howard University Law School in 1966 and 1971, respectively; and plaintiff King graduated from North Carolina Central University Law School in 1969. These plaintiffs allege that the procedure for admitting applicants to practice law

in South Carolina is constitutionally infirm because: (1) the State Board of Law Examiners purposely discriminates against blacks in grading bar examination papers; (2) the bar examination itself inherently discriminates against blacks whose segregated educational background severely restricts them in competing with white applicants who take the same examination; (3) a greatly disproportionate number of blacks fail the bar examination and no demonstrative evidence has been produced that the bar examination as given by the defendant Law Examiners is an appropriate vehicle to test the skills required of a practicing attorney; (4) there is no established procedure for an applicant who fails the bar examination to seek review of the grading of his examination paper or, alternatively, to request a hearing at which time such applicant might present himself to the Board of Law Examiners for further evaluation of his background, which evaluation might reflect possession of the skills requisite to establishing minimal competence to practice law.

The plaintiffs' first contention that the defendant Law Examiners purposely discriminate against blacks in the grading of the bar examination papers is completely unfounded and utterly without merit. The evidence adduced in the instant case lucidly demonstrates that the examination papers are identified exclusively by number and that no law examiner is privy to the actual identity of the applicant whose paper he grades. The only person who possesses knowledge of the actual identity of a particular applicant is the defendant, Miss Frances Smith, who is the Clerk of the Supreme Court of South Carolina. The list matching the name of an applicant with the identification number used on that applicant's examination paper remains in the exclusive possession and control of Miss Smith and no law examiner ever views this list or has knowledge of the information contained thereon. Plaintiffs, in a further effort to prove intentional discrimination against them, unsuccessfully attempted to demonstrate that the style of writing of blacks is indigenous to that class to the end that a law examiner can easily recognize

the paper of a black examinee and discriminate in grading without having prior knowledge that such examinee was black. From the evidence submitted, it is crystal clear to this court that the Board of Law Examiners in no way has discriminated against the plaintiffs in particular, or blacks in general, and the grading of examination papers by number rather than name should provide adequate assurance to the plaintiffs that the bar examination is fairly and properly administered. The record in this case unequivocably demonstrates a fact long known by this court, to-wit, that the individual members of the Board of Law Examiners are successful attorneys possessed of the highest character and integrity who, at the request of the Supreme Court of this State, have undertaken an awesome task in agreeing to devote the required time semi-annually to fairly prepare and impartially grade several hundred bar examination papers.

Reviewing plaintiffs' second contention that the bar examination inherently discriminates against blacks, the courts have uniformly held that a state may,

within constitutional bounds, require that applicants for admission to the bar meet prerequisites "which have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); see, Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Halliman v. Committee of Bar Examiners, 65 Ca.(2) 447, 55 Cal. Rptr. 228, 421 P.(2) 76 (1966). The hypothetical question, essay type examination given in South Carolina has been approved in a number of jurisdictions. See, Chaney v. California, 386 F.(2) 962, 964; Feldman v. Arkansas Board of Law Examiners, 438 F.(2) 699; Tyler v. Vickery, C/A #15866, (N.D. Ga. 1972); Parrish v. Board of Bar Examiners of Alabama State Bar, C/A #3809-N, (M.D. Ala. 1973). In the opinion of this court, from the testimony presented here, the bar examination administered in South Carolina is a proper method by which well qualified bar examiners determine whether a particular examinee exhibits the necessary knowledge in each of the required subjects to permit

such examinee to competently practice law in this state. The type of examination used by the Board of Law Examiners has universally been recognized and applied in both bar examinations and law schools as the most utilitarian method of testing the ability of a particular examinee to perceive and apply abstract legal principles to given factual situations. Viewed in this light, it is manifest that the South Carolina bar examination as presently administered has a rational connection with any applicant's fitness or capacity to competently practice law in this state. While it is true that no one can legitimately contend that the bar examination is an infallible "success meter", the rational relationship between such examinations and competence to practice law is recognized in forty-seven (47) of the fifty (50) states, and this court rejects the plaintiffs' contention that the bar examination in South Carolina is inherently discriminatory. When a procedure has been developed by a state to protect the liberty and property of its citizenry, a court should be especially leery of reconstructing such

procedure, unless evidence adduced regarding the same compels the conclusion of unfairness and discrimination, factors certainly not present here.

The plaintiffs next argue that a disproportionate number of blacks are unsuccessful when taking the bar examination and this fact creates a presumption of discrimination, which presumption is binding on this court unless the defendants offer a satisfactory legal explanation to dispel such presumption. Brown v. Gaston County Dyeing Machine Co., 457 F.(2) 1377 (4 Cir. 1972). The evidence presented here on this issue by the defendants has, in this court's opinion, overcome the presumption of discrimination in that it appears that a significant percentage of the blacks who have failed the examination have attended one particular law school whose academic standards for admission are admittedly less stringent than the standards of virtually all other accredited law schools. This particular school, Howard University Law School, has as its laudible purpose the assimilation of as many black attorneys as possible into the

legal profession in the various states of the nation, and, in order to accomplish this result, Howard University Law School has admitted many high risk students. The uncontradicted evidence reveals that Howard University law graduates on a nationwide basis do not fare nearly as well on state bar examinations as do graduates of other accredited law schools, and the proven experience in South Carolina too, has been that black graduates of the University of South Carolina Law School attain a much higher rate of passage on bar examinations than do graduates of Howard University. In reaching this conclusion, this court does not intend criticism of Howard University Law School, for that school's efforts to increase the number of qualified black attorneys admitted to practice throughout the United States deserves praise, not opprobrium. This court recognizes, particularly in South Carolina, that the black attorney has been of special and immeasurable value in solving community problems, advancing the causes of minority groups, and promoting tranquility between the races. On the one hand, this court understands the

need and value of having competent black attorneys admitted to practice in this state, but, on the other hand, this court recognizes that the State of South Carolina must establish reasonable standards equally applicable to all who seek admission to the practice of law in this state. The plaintiffs themselves testified, as did one of the plaintiffs' witnesses, himself a truly outstanding black attorney, that the black examinees neither desired, nor were they entitled to, special consideration, but that such examinees desired only to be graded on an equal basis with all other examinees. The fact that the standards used by the Board of Law Examiners may work a disproportionate hardship on black examinees does not establish discrimination against blacks in general, or the plaintiffs in particular, unless such standards are arbitrary, or do not meet the rational relationship test, or are applied differently to blacks than to whites. (See, Schware, supra, and Tyler, supra.) Since a reasonable explanation has been advanced by the defendants for the fact that a greater percentage of whites than blacks pass the bar examination,

and since there is no evidence here that the standards used by the Board of Law Examiners are arbitrary, or that such standards are unfairly applied to blacks, the court having previously determined that a rational relationship does exist between the bar examination as given and any applicant's competence to practice law in South Carolina, this court is of the opinion that the disproportionate rate of failure of black bar examinees is not the result of any unconstitutional infirmity, either inherent or purposeful, in the bar examination.

Finally, plaintiffs assail the failure of the bar admission procedure to provide an unsuccessful examinee the opportunity to have his examination paper reviewed to ascertain the reasons for his failure, and they attack, too, the lack of an established plan for such an examinee to meet with the Board of Law Examiners to have his legal qualifications further evaluated. The absence of such review procedures is claimed by the plaintiffs to deprive unsuccessful examinees of due process of law. Some courts have held that there is no constitutional right to an adversary review

of bar examinations. Ex parte Ross, 196 Ga. 499, 26 S.E.(2) 880, 197 Ga. 257, 28 S.E.(2) 925 (1944); Miotec v. Nair, 4 Conn. Cir. 313, 231 A.(2) 95; In re Monhahan, 126 Ver. 53, 222 A.(2) 66, 126 Ver. 193, 225 A.(2) 387, cited in Parrish, supra. The establishment of such a review procedure rests within the inherent authority of the Supreme Court of South Carolina. 1962 Code of Laws of South Carolina, Section 56-96. Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366 (1867); Brydonjack v. State Bar, 208 Cal. 434, 281 P. 1018 (1929); Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211 (1933); Payne v. State, 52 Ga. App. 425, 183 S.E. 638 (1936); Re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906). Since the authority to establish a post-examination review procedure is vested in the Supreme Court of South Carolina, and the plaintiffs here admittedly have failed to seek relief in that Court, it would not, in this court's opinion, be appropriate to decide the due process issue here presented until the Supreme Court of South Carolina has been given an opportunity to review the same. The principle of comity,

so vital to the maintenance of a stable federal-state judicial relationship, demands that this court abstain from further action in this case at the present time. Lynch v. Snepp, 472 F.(2) 769 (4 Cir. 1973). This court has complete confidence that the Supreme Court of South Carolina will offer the plaintiffs a fair and equitable forum in which they can advance their due process claim, if they be so advised to raise such issue in that court.

Based on the foregoing, it is

ORDERED, that the due process issue herein presented by the plaintiffs be, and the same hereby is, dismissed without prejudice, and the plaintiffs are hereby given the right to move this court to reinstate this case for final determination of this due process issue after the plaintiffs have exhausted such procedures as the Supreme Court of South Carolina may make available to them.

IT IS FURTHER ORDERED, that, except as above set forth, the complaint herein is dismissed with prejudice.

IT IS FURTHER ORDERED, that each party pay its own costs in this case.

Charleston, South Carolina
October 18, 1973

s/ Sol Blatt, Jr.
UNITED STATES DISTRICT JUDGE